Spokane Tribe of Indians

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Attn: Penny Coleman

Comments to Proposed Rules re Class II Classification Standards

November 15, 2006

The Spokane Tribe is on the verge of compacting with the State of Washington. As you know, the Spokane Tribe has sought a Compact with Washington State since 1988, but the State hid behind Eleventh Amendment immunity and refused to consent to IGRA's negotiation/mediation process. As a result, the Tribe has had to defend itself against repeated enforcement efforts of the State, the U.S. Attorney and the NIGC. The Ninth Circuit ruled that such enforcement action is inappropriate in such circumstances. *Spokane Tribe v. United States* 139 F.3rd 1297 (9th Cir. 1997). Accordingly, the Tribe has been successful in defending against those actions such that, at first glance, the issue of Class II gaming is moot. Despite those successes, however, the NIGC and other agecies continue to threaten enforcement action, poisoning the business environment for prudent long-term capital investment decisions. Although we are close to an agreement with the State, there is no assurance of an agreement until approved in the Federal Register (and as witnessed by New York Oneida, the Tribe is still subject to challenges). Any agreement with the State will likely include market restraints on the number of Class II devices. Accordingly, Spokane knows well enough that it may ultimately be forced to look only to Class II gaming to generate desperately needed revenue. The proposed rules would eliminate the availability of viable class II games. The NIGC's action plays into the hands of those states which use the compacting process to overreach and extract unfair concessions from tribes. The proposed rule is not soundly based in law or in policy. The Spokane Tribe urges you to withdraw the rule.

The Spokane Tribe appreciates the opportunity to comment on the regulations proposed by the National Indian Gaming Commission ("NIGC" or "Commission") on May 25, 2006, specifically, on the proposal to amend 25 CFR parts 502 and 546 to include "Classification Standards for Bingo Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using "Electronic, Computer, or Other Technologic Aids," 71 Fed. Reg. 30238 (May 25, 2006), and the separate proposed rule to amend the Definition of "Electronic or Electromechanical Facsimile," now found at 25 C.F.R. § 502.8. 71 Fed. Reg. 30232 (May 25, 2006).

As the Commission is certainly aware, the IGRA acknowledged tribes' rights to conduct such gaming as is otherwise authorized in the states in which they are located, but with certain significant limitations. Class I gaming has no economic significance. Of the rest, only class II gaming – a distinction created by Congress in the IGRA -- may be conducted without state consent. All other gaming, class III requires a tribal-state compact under 25 U.S.C. 2710(d)(7).[1] While many tribes have successfully secured such compacts, there is no question that the states have achieved substantial power to either deny compacts or to extract significant concessions from tribes. Those tribes that still depend on class II gaming do so because they have no other alternative. In many instances, those tribes have no alternative route to economic development, and face the daunting poverty that Indian gaming has relieved in many other locations. These regulations raise the specter of returning to that hopelessness.

Over the past two years, as the NIGC has released a series of draft classification regulations. Despite vigorous objections from tribal commenters, the NIGC's successive drafts have reflected few of the many substantive changes recommended in the course of written and oral public comment by the many entities with expertise and responsibility for the conduct of class II tribal gaming operations. As a result, many of the comments set forth below will be similar to those previously provided, but will be no less significant for the necessary repetition. These comments reflect the divergence of the NIGC's proposed classification standards from the legal principles established by the Indian Gaming Regulatory Act ("IGRA," or the "Act") itself and by judicial interpretation of the Act. In addition, these comments highlight the unsuitability of the NIGC's classification scheme to the essential task of preserving and protecting the economic viability of tribal class II gaming. If these regulations are permitted to take effect as proposed, the only technologically aided play of bingo and pull tab games will take place in jurisdictions not regulated by the NIGC, and those state and charitable gaming operations will soon render class II gaming an empty and broken promise. It will complete the economic defeat accomplished by the *Seminole* decision's bar of tribes' ability to enforce the states' good

[1] There are circumstances in which Class III gaming may be operated in the absence of a compact: (1) Where a Tribe has brought a lawsuit under IGRA and the State rejects the recommendation of a court-appointed mediator 25 U.S.C. § 2710(d) (7)(a)(vii) ; where the Secretary authorizes such gaming after a State refuses to waive 11th amendment immunity, 25 CFR § 291; cf. *Alabama v. .Department of the Interior* (pending N.D. Fla. – challenging legality of Secretary procedures); and (3) where a Tribe has done everything required under IGRA but the State refuses to consent to IGRA's negotiation/mediation process., see *Spokane Tribe v. United States* 139 F.3rd 1297 (9th Cir. 1997). None of those circumstances, however, has proven to be readily available to Tribes confronted by recalcitrant states.

faith compact obligations. The unbalance of IGRA will be reinforced, as will the continuing deprivation of tribes deprived of bargaining power and economic alternatives. The Spokane Tribe previously expressed concerns to you in the context of formal government-to-government consultation in Tacoma, Washington on July 24, 2006. The Spokane Tribe asks the Commission to give serious consideration to these comments and those submitted by other tribes seeking to protect the opportunity enacted into law by Congress and now threatened by these proposed regulations.[2]

The NIGC's proposed regulations pose the threat of economic termination for tribes dependent on class II gaming.

1) The Facsimile Definition improperly prohibits games authorized by the IGRA

As a threshold matter, the Spokane Tribe objects to the Commission's decision to propose a separate rule defining the electronic play of class II games as "facsimiles." That provision, peremptorily rescinding the NIGC's own 2002 facsimile definition, does nothing to clarify the permissible scope of class II gaming. Instead, essentially reinstating the discredited facsimile definition rejected by the prior commission, it would establish a flat prohibition that contradicts Congress's stated intent in the passage of IGRA, to permit tribes the maximum flexibility in the use of technological aids in class II play. Without its third section, separately proposed within the classification regulations, the facsimile definition wholly prohibits electronic game play, creating a presumption that electronic play of class II games is illegal. That presumption is flatly contradicted by IGRA's express authorization of technologic aids, by the IGRA legislative history, and by judicial interpretations of the statute – as recognized by the previous Commission in promulgating the existing facsimile definition.[3] The dubious relief promised by that section, through compliance with the classification provisions, is little help. Those proposed classification standards, as discussed below, are so restrictive and unclear as to provide no relief at all.

As proposed, the classification regulations unreasonably constrict the play of the games of bingo, games similar to bingo and pull tabs when played through an electronic medium. The regulations would create of a game of "bingo" with no existence outside

[2] The Spokane lacks expertise to comment on the NIGC's proposed "Technical Standards for 'Electronic, Computer, or Other Technologic Aids' used in the Play of Class II Games," 71 Fed. Reg. 46336 (August 11, 2006). It has been advised, however, that the proposed Technical Standards would mandate unnecessarily restrictive requirements purporting to safeguard the integrity of class II play. The Spokane agrees that game integrity is critical to tribal gaming operations, and continues to work with its suppliers to protect that interest. We have been informed, however, that the level of oversight exceeds that otherwise existing in the gaming industry elsewhere in the United States, and that the incremental cost of compliance, coupled with the diminished value of the reclassified class II games, is likely to encourage vendors to abandon the market. The Spokane Tribe urges the Commission to withdraw its proposed Technological Standards and undertake consultation with the vendors in the industry with a goal of producing standards that are both effective and economically reasonable.

[3] The existing definition, however, like the proposed classification standards, improperly precludes the electronic play of pull-tabs, creating an artificial distinction between an electronic pull-tab and an electronic bingo card. The Spokane Tribe believes that distinction lacks rational basis, and should be deleted.

the new artificially restricted environment, and that game would be, essentially, unplayable.

Bingo is defined by the IGRA

The Indian Gaming Regulatory Act, while not a paragon of legislative drafting, did establish a definition for "bingo." Those three criteria have been upheld as sufficient to define the class II game in the context of evaluating its play using technological aids. Even though Circuit courts have rejected previous attempts to impose additional requirements on the game of bingo, the NIGC's proposed regulations assert the ability to do so. None of the arbitrary requirements that the NIGC propose to engraft onto bingo game play is supported by the IGRA definition, and none of them is within the NIGC's authority to impose.

Thus, the Spokane Tribe objects to:

a) Prohibition of auto-daub
b) Arbitrary requirements of "sleeping" balls
c) arbitrary restrictions as to size and configuration of the bingo card
d) mandatory75 ball draw for a bingo game
e) requirement of multiple ball releases
f) requirement of sequential display of balls within each release
g) requirement of 6 players per game
h) 2 second delay of game initiation
i) 2 second requirement for each ball release
j) 2 second delay of each daub period
k) Requirement of common interim patterns
l) Requirement of 20% minimum prize
m) Requirement of 2 inch game labels
n) Minimum percentage of screen devoted to bingo display
o) Artificial restrictions of "games similar to bingo" – collapsing into bingo definition
p) Prohibition of pre-drawn balls
q) Arbitrary restrictions on electronic pull tabs.

These requirements, taken together, force the game of bingo into an inflexible and unplayable mold – wholly outside of the intent of Congress when it confirmed the tribes' right to conduct class II gaming for economic development. None of those provisions assist in distinguishing bingo from class III games, but only distinguishing "bingo" from the NIGC's unfortunate creation.

The permissible class II play of bingo is characterized by the three IGRA definitional criteria –a game played with cards bearing numbers or other designations, determination of numbers, won by the first player to cover. The legislative history

further distinguishes a facsimile as a game in which a player plays with or against a machine rather than with or against another player. Player competition is essential to bingo under the IGRA. Technological aids are expressly authorized. As to the three criteria, courts have upheld electronic cards, electronic daubing and claiming of bingo games. The statute itself authorizes electronic determination of numbers. If the combination of such electronic play – through attractive technology – permits the play of fast, fun and lucrative games in a competitive environment, then the IGRA purpose of enhancing tribal self sufficiency can be achieved, even by tribes who have been unable to obtain a class III compact.

The NIGC's classification proposal is nothing more than a bar to achieving that IGRA purpose. The proposal would interpose arbitrary delays to the play of the game – making a 3-5 second game stretch into 10-12 seconds. Patently, this will result in fewer possible game cycles. More significantly, it will result in fewer players willing to enter into the game at all. Bingo has long been played in "lightening" form or in other variations intended to establish a quick paced experience. The NIGC's proposal to delay game play does not distinguish technologically aided bingo from impermissible class III play, it merely establishes a class of games that will fail.

The proposal contains several provisions wholly alien to the play of bingo. For example, the NIGC would establish disparate applications for "sleeping" balls, depending on whether the player would achieve a game winning prize or a "bonus" prize. Sleeping rules, long established by the location of play, have never been a given of bingo games, but where they exist, have been wholly a matter of sleeping "patterns," and not individual balls. It is likely that the difference in application to interim patterns will result in player confusion and dissatisfaction. That requirement, alone, is likely to discourage potential players.

Other arbitrary provisions include the limitations on the designation and release of numbers, on display of numbers and the prohibition of differing interim patterns within a game. The IGRA does not impose such limits – but merely requires that the numbers be determined, and that players match those numbers to pre-designated patterns. If, as in many bingo session games, the house chooses to offer expedited play through pre-drawn balls, or through accelerated ball release, then the house should have the opportunity to make the same choices through a technologically aided game. Similarly, marketing options have included offering players the opportunity to purchase additional pattern play within a bingo session. Because there is no reason to prohibit technologic aids from offering those same choices, the NIGC's prohibition of differing interim patterns is unreasonable.

Tribal class II operations have found great value in the ability to offer "auto-daub" in their electronic player stations. The NIGC would flatly prohibit its use. There is no IGRA basis for this prohibition. Session bingo players have long had the ability to claim bingo wins that were never daubed, much less contemporaneously daubed, so long as those players could track matches on their cards and claim those wins timely. Requiring multiple overt daubs is unnecessary to preserve the essence of bingo. A skillful paper

bingo player may claim wins without ever daubing. Others may use electronic aids to keep track and daub numbers. Such aids are presently used in connection with session bingo – and permit players to play the game on hand held devices. Players who chose to compete in bingo through linked electronic player station may lawfully use auto daub to track and cover the numbers on their card(s). There is no lawful basis for prohibiting such play.

The NIGC's attempt to control prize amounts improperly inserts itself into marketing decisions. Tribal class II facilities, in consultation with their suppliers, should have maximum flexibility to construct a technologically aided game that has economic viability – so long as the legal criteria are met.

Taken together, the provisions of the NIGC proposal appear to assign more significance to cosmetic details than to the underlying characteristics of an electronic game. Merely labeling a game –"This is a game of bingo" – indicates that the Commission is improperly focused on perception, rather than reality, of the game itself. The same reasoning applies to minimum percentage of bingo display. The overall effect seems to be to prevent the play of any game that is fast, fun and lucrative – hence the multiple releases, arbitrary delays and prohibition of auto-daub; the confusing rules on sleeping, artificially restricted use of interim patterns: and the cumulative effect of a game that is wholly unplayable.

Finally, in defining "games similar to bingo," the proposed regulations eliminate nearly all possibility of building creative variations to the game. In essence, the regulations eliminate the IGRA's authorization of "games similar to bingo," separately enumerated in the list of class II games. Only a slight concession in bingo card size and range of ball draw keep the category of "similar to bingo" from being a nullity. But such trivial variations, which could easily have been included within the definition of bingo itself, are not a meaningful class of games. Instead, and among games in play at the time IGRA was enacted, other variations include games using pre-drawn balls, such as bonanza bingo, or, as the NIGC's own existing definition provides, games that do not fulfill all the statutory criteria of bingo. In the unnecessarily restrictive provisions governing games similar to bingo, the NIGC has chosen to interpret a statute intended to benefit Indian tribes in a manner least favorable to the tribes. This approach, repeated throughout the proposed regulations, is not consistent with Congressional intent or the Commission's duty, as recognized by the *Seneca-Cayuga* court considering the prior Commission's definition of technologic aids. Tribes should be permitted the full scope of gaming authorized by statute, even if those games have evolved to provide more revenue than originally anticipated. If tribes must endure the unexpected harm resulting from IGRA, (particularly the failure of the compact provisions), then tribes should also have the opportunity to enjoy the unexpected benefits.

The proposed certification process is fundamentally flawed.

The NIGC proposes to assign the certification of games entirely to outside laboratories. While it is understandable that the Commission would seek additional technical expertise to inform its decision making, the process, as proposed, improperly assigns the evaluation of important legal distinctions without adequate oversight and opportunity for review. First, the certification process improperly replaces tribal gaming commissions as primary regulators of Indian gaming. Second, the laboratory's final decision is not subject to appeal by the applicant – either tribe or vendor. Third, only the Chairman is permitted to challenge the outcome of a laboratory certification – but there is no meaningful limit on when the Chairman may do so. Thus, the tribe and its vendors have no ability to question a negative outcome, and no reason to rely on a positive determination – since the Chairman may revoke it. The entire process creates an unacceptable uncertainty. Manufacturers cannot live with it. Operators cannot make critical decisions. And Tribes will certainly have more difficulty in obtaining financial support. Financing institutions simply cannot live with an environment in which a tribe's class II operation may be deemed illegal, with no predictability and little recourse.

Transition time is inadequate

If the regulations are promulgated, the Tribes would be required to install only certified games, with existing games grandfathered only for a period of six months. It is unreasonable to believe that the certification process will be complete, as to any existing vendors, within a six month period. Even assuming that laboratories are promptly identified, there are presently more than 50,000 individual electronic player stations in use in class II facilities. While these represent a smaller number of competing systems, none of those existing games comply with the NIGC's proposal. All of them would, presumably, require significant alteration before certification would be possible. And that alteration presumes that compliance is technologically feasible, and that manufacturers would be willing to undertake that burden. It is unlikely that the substantial costs of compliance would be borne by the vendors alone – and it remains to be seen whether the decreased revenues of the new games would support the cost of game changes. But the six month period for overall compliance would clearly be insufficient. And barring any new facilities from opening without certified games would be a total barrier to entry. We suggest that any transition period be lengthened to two years – and that some alternate provision be made for new facilities during that time, perhaps phasing in new games as they are certified.

The Economic Impact of the Proposed Regulations would be Devastating – and most affect those Tribes least able to bear the loss.

We have been informed that the time delays, alone, would massively degrade our ability to produce revenue from the games. Indeed, we understand that economic surveys have confirmed the devastation that would result – not only from the delays, but from the wholly unattractive games that would have to be built to comply with the NIGC's proposal. Moreover, those wholly unsatisfactory games might never be built. At the

NIGC's hearing on September 19, 2006, a panel of vendors of class II games unanimously expressed their opinion that the games would be an economic disaster, and would likely force them out of the market. If reputable vendors are unwilling to participate in the industry, then tribes class II operations will, essentially, be without support. Thus, even the best market study does not anticipate the overall extinction likely to prevail at all but a few geographically favored locations. Ultimately, those tribes without compacts, and without advantageous locations, will incur the greatest harm. Because their facilities have never been significantly lucrative, their injuries will not greatly inflate the "regulatory cost," but the cost will be the death of vital and under-funded tribal services. We have not yet had the opportunity to review the NIGC's own economic survey[4], but understand that it supports our conclusion. The NIGC's estimate that the economic impact of the proposed regulations would be "less than $100 million dollars" is flat wrong.

The Proposed Regulations Should be Withdrawn

The Spokane understands that the NIGC has struggled with the classification of games for many years. It has a history of releasing a succession of advisory opinions which, over time, have generated a body of guidance that is often self-contradictory, and sometimes rejected by courts. Earlier NIGC regulations have been found similarly wanting. While the Spokane Tribe appreciates the Commission's concern with fulfilling its regulatory responsibility, it strongly urges that these regulations do not further proper identification of technologic aids to the play of class II gaming. The courts have begun that process – and have rejected attempts by the Justice Department to impose criteria similar to the current "Facsimile" proposal. No court has suggested that bingo may only be played if the game is slowed, labeled or recreated in a form unrecognizable in any other bingo environment. These regulations would run class II gaming off the road. The NIGC must recognize that this draft suffers from more than minimal defects, and should be withdrawn. And further attempts to provide a "bright line" for class II gaming would best be undertaken with the consultation and active involvement of experts from tribal operations and manufactures accustomed to addressing the issue in light accommodating IGRA provisions to reflect real world play and economic realities.

It saddens us to see a regulatory agency charged with the responsibility of manifesting Congress' intent in passing IGRA has such troubling priorities. The one fundamental and significant development that thwarts Congressional intent is the loss of the Tribes' remedy against recalcitrant States in *Seminole Tribe v. Florida.* Rather than directing resources to bringing the tribal/state government-to-government relationship back into balance, NIGC carries the water of recalcitrant states. The NIGC's position on Class II gaming classification standards stands with the illegal imposition of Class III minimum internal controls, and enforcement actions against non-compacted class III

[4] The studies, only released last week, are consistent with other studies we know of, and certainly consistent with the Spokane Tribe's understanding of the impact it will suffer if the proposed rule goes into effect. We understand that the record for comments will remain open past November 15, 2006 for the limited purpose of commenting on the two studies.

gaming as evidence that the agency is facilitating states whose agenda is to overreach and extract unfair concessions from tribes.

The Spokane Tribe urges you to consider the detailed issues set out above, but we also urge you to look at the issue in the broader sense of your trust responsibility to tribes and to manifests Congress' intent in passing IGRA.

Respectfully submitted,

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Chairman
Spokane Tribe